No. 10-431

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KYLE RAINEY,

Petitioner,

vs.

JEROME WALSH *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The Commonwealth of Pennsylvania[1] makes only a few points in its brief opposing Mr. Kyle Rainey's petition for a writ of *certiorari* that warrant any sort of reply.

Contrary to the Commonwealth's claim, this case is a proper vehicle to decide the issue Mr. Rainey presented for review. The Third Circuit announced a general rule that distills the Sixth Amendment's effective-assistance guarantee into one question: Did the defendant receive a longer or harsher sentence than the one he is currently serving as a result of his lawyer's deficiencies? If the answer is yes, then prejudice has been established under *Strickland v. Washington*. If the answer is no or even probably not, a *habeas* petitioner can never establish prejudice.

As Mr. Rainey explained in his petition, this is a different standard than the Court established in *Strickland*, and it conflicts with the way other courts of appeal analyze prejudice for Sixth-Amendment claims. If the Court means to resolve the split that the Third Circuit expanded and hold that "prejudice" does not mean – for all purposes – a longer or harsher sentence, then the Court should grant the petition. If the Court means to interpret "prejudice" under *Strickland* as requiring proof of some harsher sentence, then the Court should grant *certiorari* and say as much. But that decision should not be left to the Third and Fifth Circuits, the only two circuits that apparently subscribe to such a rule, particularly when those hold-

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[1] Mr. Rainey refers to respondents Jerome W. Walsh, Superintendent of SCI-Dallas; the District Attorney of Philadelphia County; the Attorney General of Pennsylvania collectively as "the Commonwealth" for purposes of this reply.

ings are squarely at odds with the language of *Strickland* and the application of *Strickland's* prejudice prong by other circuit courts. There is a lack of uniformity among the approaches applied by the courts of appeal.

The Commonwealth incorrectly suggests that the result in this case is a function solely of Pennsylvania's *sui generis* sentencing scheme. The holding is far broader. For example, the Third Circuit's rule applies any time a *habeas* petitioner claims his counsel failed to question the sufficiency of the evidence to sustain a guilty verdict at trial. Applying the prejudice standard announced by the Third Circuit, the court in essentially any *habeas* case would be required to ignore a plainly erroneous guilty verdict if there were evidence that would support some other verdict that carried with it the same sentence as the one the petitioner received – regardless of whether the jury ever reached a verdict on that other potential charge.

The Third Circuit's same-sentence-equals-no-prejudice rule applies at other stages of a criminal proceeding as well. Assume for the moment that a defendant is charged with three crimes: (1) robbery (which carries with it a five-year sentence); (2) reckless endangerment of a person (which carries with it a two-and-one-half-year sentence); and (3) possession of a narcotic with the intent to distribute (which carries with it a two-and-one-half-year sentence). The defendant accepts a plea bargain for robbery based on patently erroneous advice from his lawyer and receives a five-year prison sentence. If the defendant later raises a Sixth-Amendment claim based on his lawyer's substandard performance, the defendant will lose under the Third Circuit's rule because he could have received five years in prison if tried for and convicted of reckless endangerment and possession with the

intent to distribute. Nothing in this Court's jurisprudence would support such a result.

The Commonwealth's brief addresses the far-reaching implications of the Third Circuit's legal holding not really at all. Instead, it states in conclusory fashion that the case is unique and then spends a surprisingly significant amount of time arguing about other issues such as whether Mr. Rainey properly raised a "sufficiency-of-the-evidence" claim and whether Mr. Rainey shared the specific intent of the actual shooter who killed the victim in this case.

As to the first point, Mr. Rainey raised a sufficiency claim, and the Third Circuit properly reached that conclusion. That Mr. Rainey may have inadvertently mixed the words "weight" and "sufficiency" in some of his *pro-se, habeas* papers is not surprising given that skilled judges and lawyers frequently do the same thing. The Third Circuit properly looked beyond the label Mr. Rainey used and found that, in substance, he raised a sufficiency claim. That is precisely the liberal analysis the courts should employ when interpreting *pro-se, habeas* papers.

As to the second point, there is nothing "sufficient" in the constitutional sense about the specific-intent-to-kill evidence against Mr. Rainey at trial. The "evidence" that the Commonwealth suggests is "sufficient" to establish a specific intent to kill is essentially as follows: Mr. Rainey was older than the actual shooter; he was at the scene of the robbery during which the actual shooter pointed a gun at, shot, and killed the storekeeper; and Mr. Rainey was the mastermind of a robbery (based solely on non-substantive impeachment testimony that could not be used to establish intent under Pennsylvania evidence law).

There is nothing in the set of facts upon which the Commonwealth relies to establish beyond a reasonable doubt that Mr. Rainey intended that his co-defendant or anyone shoot and kill the victim in this case (or anyone else). In light of this scant evidence of specific intent, Mr. Rainey's lawyers fundamentally erred in a constitutionally significant way by not raising the sufficiency-of-the-evidence issue at trial and on appeal.

As a final point of clarification, the Commonwealth repeats throughout its opposition brief that the jury "found" Mr. Rainey "guilty" of second-degree murder. That is incorrect.

The jury never rendered any guilty verdict for second-degree murder in this case. The space next to "guilty" for "second degree murder" on the verdict sheet in this case is blank. The jury did not impliedly find Mr. Rainey guilty of felony murder, either, under a "lesser-included-offense" theory. Indeed, it could not have. A guilty verdict for first-degree murder in Pennsylvania does not *ipso facto* mean that the jury necessarily found all the elements for second-degree (felony) murder because second-degree murder is not a "lesser-included" offense of first-degree murder. The two offenses involve totally different elements. If Mr. Rainey would have been acquitted for first-degree murder as he should have been, the court could not have a directed a verdict for second-degree murder.

The Commonwealth's suggestion that the jury actually rendered a guilty verdict for second-degree murder is unfortunate. It is one thing to argue that certain facts in a record *prima facie* support the elements of a crime. It is entirely different thing to say that the jury rendered an *actual verdict of guilt* based on those facts when, in fact, it never did. That assumption pervades the Third Circuit's decision as well because it too in-

correctly hypothesized that the jury would have convicted Mr. Rainey of second-degree murder. As Mr. Rainey noted in his *cert* petition, the law does not presume to know what a jury might do in any given case.

Because the Commonwealth's argument regarding prejudice hinges on the false premise that the jury found Mr. Rainey guilty of a crime for which he would have received the same sentence he currently is serving, the opposition to the petition falls flat.

CONCLUSION

The Court should grant Mr. Rainey's petition for a writ of *certiorari*.

Respectfully submitted,

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